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Oversight Hearing on Remedies for Small Copyright Claims

Testimony of Jenny Toomey
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Before the
Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

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Good afternoon. On behalf of the Future of Music Coalition, it is my honor to testify before the Subcommittee on Courts, the Internet, and Intellectual Property, and to add our perspective to this oversight hearing on "Remedies for Small Copyright Claims".

This subject is complex, and it is not an issue on which FMC has taken a firm position. In the recent past we have made some prudent suggestions regarding the related question of orphan works at the US Copyright Office. We believe there is some value in restating some of these here today. We will also consider the question of "remedies for small copyright claims" in the broader context of issues that are impacting the music community. Finally, we hope to articulate what we have learned from organizing disparate music communities around key policy issues.

To begin, I will provide a brief background about myself, and the Future of Music Coalition. My name is Jenny Toomey. I am a musician, entrepreneur and activist. I have released seven albums and toured extensively across the United States and Europe. For eight years, I co-ran an independent record label called Simple Machines. For the past six years I have run the Future of Music Coalition. I speak to you today both as a working artist and as Executive Director of that organization.

FMC is a national nonprofit education, research and advocacy organization that identifies, examines and translates the challenging issues at the intersection of music, law, technology and policy. Recent history has shown that technology has vastly increased opportunities for both artists and consumers, and facilitated the creation of efficient methods for promoting, distributing and selling music. FMC was founded in the midst of this technological paradigm shift, based on the strong belief that, in order to avoid replicating inefficient or unequal structures of the past, artists and artist advocates must be at the policymaking table to balance the traditional major label, technology and commercial radio players. This is our organizational mission and we are, therefore, quite honored to have our views included in today's discussion.

Organizing Artistic Communities Around Key Policy Issues

In the past six years we have recognized that the legal, technical and legislative environment surrounding musicians is a delicate ecosystem. Remedies that serve musicians' allies and music business institutions may serve to undermine the position of individual musicians. Even less obvious, solutions that serve *one* class of musician may undermine or under serve *another* class of musician. We have, therefore, learned that there are very few black and white answers to the broad grey space we inhabit, and despite our deep desire for remedy and clarity, we must proceed with caution when establishing new structures that impact the livelihood of creators.

Let me give you an example of the range of differences within the music community. FMC has had the opportunity to speak all over this country and the world. Generally, we are included in panel discussions with experts from other artistic and academic disciplines as the musicians' voice and are often asked, "What do musicians think about…x?" This question is simultaneously impossible and simple to answer. Impossible, as it would take years to document the variety of perspectives held by musicians on any issue. Simple, as the concept of complexity is easy to convey.

For example, in response to the question, "What do musicians think about the new digital marketplace?" I can say:

> "At this very moment there is one musician in an online chat room collaborating with another musician on the other side of the globe. That musician is recording synthetic sounds created exclusively on her computer. These sounds are digitally recorded and sent across the internet, and the completed compositions are fixed in a flexible copyright with a Creative Commons license and made available exclusively as free digital tracks distributed through peer to peer networks.
>
> "At the same time, there is another musician recording his spinet on a turn-of-the-century Edison cone recording machine that he purchased at a thrift store. He will

> fix these compositions using an analog tape machine and the release the album as a vinyl record with formally registered copyrights, for sale only in brick and mortar record stores. When interviewed, this artist will decry the technological innovation that allows music fans to listen to his compositions digitally in any order other than the one he established on the record."

However disparate and extreme, these examples are an attempt to convey the range of valid perspectives held by individual members of the music community that we represent. They are also a means of implying the increased complexities that arise when legal or legislative solutions are proposed to serve the needs of more than one artistic discipline. Copyright law lives not only at the complex intersection of commerce and art, commerce and speech, commerce and ideas – but also at the complex intersection of art and art. Laws that protect illustrators must also serve composers and choreographers. We urge the committee to recognize this complexity as you proceed and include as many stakeholders as possible in the process.

Small Copyright Claims and Musicians

Second is the question of where the issue of small copyrights claims falls in the spectrum of complex policy issues musicians face. In preparation for this hearing I have read "A Quick and Inexpensive System for Resolving Peer to Peer Copyright Disputes," by Mark Lemley and Anthony Reese. It seems to me a measured and reasonable proposal; however, I am hesitant to speculate that this model for small claims copyright disputes would benefit all copyright owners, especially creators. First, the article addresses one specific action – filing suit against P2P file uploaders – a scope that is much narrower than even the individuals represented on this panel. Since Lemley and Reese confine their argument to one context, we would not want to speculate whether this legal procedure might also be practical in the context of orphan works.

Second, the authors of this article do not appear to contemplate individual artists using this procedure to file copyright claims. The potential benefits from this proposal for musicians would be uncertain and possibly indirect. Furthermore, the authors have not undertaken to analyze any potential harm to individual musicians from adopting this proposal or a variation of it.

My comments do not mean to diminish the importance of the issue of illegal file trading or copyright infringement to the music community, nor do I mean to dismiss the proposal as presented. But I can say that in the six years that FMC has existed as an organization, hosting national policy summits and speaking about these issues, I have never once been contacted by an artist or an artist advocate about the problem of legal fees associated with copyright infringement cases. As such, we are unwilling to speculate on the benefits for our constituency. This proposal may serve as the platform for such future discussion and, if such an action is necessary, FMC would recommend the full public participation of the arts community before any such solutions be applied.

Issues that Unite the Artistic Community

Despite the diversity of views expressed by artists across disciplines it is also quite possible to find areas of common interest and platforms for collaborative change. There are many issues with broad support across disparate communities. For example, our digital musician and our musical Luddite from the previous example would both likely be advocates for national health insurance, increased media diversity, and low power radio. This is why FMC has worked on issues such as:

> **Support for Public Performance Right for Sound Recordings.** Royalties are generated when a song is performed publicly; whether on a radio station, at a sports event, on a jukebox, or in a movie. In the US, these royalties are collected by ASCAP, BMI and SESAC and distributed to the member songwriters, publishers and/or composers. As an indication of the significance of this revenue

stream for musicians and the industries that they support, ASCAP reported distributing over $645 million to its members in 2005.[1]

While PRO royalties are distributed to songwriters and composers for public performances for terrestrial radio play, this right does not extend to the performers, recording artists or the sound recording copyright owner.[2] For example, when you hear Patsy Cline singing "Crazy" on the radio, the songwriter Willie Nelson is compensated through BMI, but the estate of Patsy Cline is not compensated for that performance, nor are the studio musicians and backing vocalists, nor the record label, that brought that song to life.

This arrangement is the result of a long standing argument made by terrestrial broadcasters that performers benefit from the free promotion that they get by having their music played on the radio, which broadcasters contend increases sales. As a result, broadcasters have avoided paying a public performance royalty to performers for decades.

Contrast this with a performance on a digital platform. Just as in traditional media, broadcasters of digital performances – webcasters, satellite radio, cable subscriber channels– must obtain licenses from ASCAP, BMI, SESAC which compensate the songwriters and publishers of the music they play. But because of the Digital Performance in Sound Recording Act of 1995, they also pay royalties to the performers. SoundExchange – the performance rights organization established by the DPRA – issues licenses to cable and satellite subscription services, non-interactive webcasters, and satellite radio stations, then distributes the royalty payments directly to artists (45%) and to the copyright owner (45%).

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[1] "ASCAP Revenues up $50M in 2005" *Billboard*, March 13, 2006

[2] There are two copyrights assigned to a musical work: the underlying musical composition and sound recording. The composition (lyrics and music) has a public performance right, which is the right administered by the performance rights organizations ASCAP, BMI and SESAC. The sound recording (ie the performance of the musical work) does not have a performance right for non-digital performances in the US.

As US broadcasters migrate to digital radio, harmonizing the licensing rules that apply to various platforms offering analogous products is more important than ever. As radio switches from broadcasting in analog to digital signals, industry engineers predict that incumbent radio station licensees will be able to program an additional two to four side-channels on their slices of spectrum, thus at least tripling their opportunity to generate revenue. Despite the digital nature of HD radio, the DPRA does not apply.[3] Therefore, all musical performances on these new HD radio stations will not have a public performance right for sound recordings. Unless Congress acts, incumbent broadcasters will continue to exploit their exempt status that sets them apart from other media providers.

FMC calls on Congress to modify the US Copyright Act to establish a broad public performance right for sound recordings, but it in a way that will not diminish existing royalty structures that compensate composers, songwriters and publishers. This modification would benefit creators, compensate performers, establish licensing parity among media providers and bring the United States' copyright standards in line with other developed nations.

Supporting Copyright Reversion and the Right to Reacquire: Copyright reversion is a negotiable clause in contracts that states the date when the copyrights revert to the creator. Section 304(c) of the 1976 Copyright Act made US copyrights revert to artists 35 years after creation despite contract length. This law was passed to protect the rights of artists who had made disadvantageous deals. In some European countries, copyrights revert if a label fails to keep a record in print.

An estimated 75 percent of the back catalog copyrights owned by major record labels are currently out of print. This practice reduces artists' ability to make a

[3] DRPA does not apply unless the terrestrial broadcaster chooses to use a side-channel to create a subscription service or an interactive service. In those cases, the radio station will pay the digital performance right to SoundExchange.

living by functionally removing their essential right to make their work available for sale. Artists who have signed away their copyrights have no legal recourse. Signing away copyrights is a basic condition of most record contracts.

A 2005 report by the Council on Library and Information Resources expressed the magnitude of this problem when it found that significant numbers of historic recordings are not easily accessible to scholars, students, and the general public for noncommercial purposes. While some recordings are limited because they only play on out-of-date technologies (cylinder players, wire machines), copyright law also adds to this problem since it allows only rights holders to make these recordings accessible using current technologies (CD re-issues, digital files), yet the rights holders appear to have few real-world commercial incentives to reissue many of their most significant recordings.[4]

While there are many barriers to copyright reversion in major label contracts, there are a number of musicians, archivists, and public domain advocates that have asked for more efficient laws that would allow authors and creators to assert their ownership rights when copyright owners fail to meet their contracted obligations. In 2005, recording artist groups, including FMC, called for reasonable legislation that would give recording artists the right to reacquire their copyrighted works if their record label had stopped making their records commercially available.

Updating Radio Payola Regulations: While various laws and hearings from the 1960s–1970s muted the prominence of payola, payola-like practices resurfaced in recent decades, but in a more indirect form. Standardized business practices employed by many broadcasters and independent radio promoters resulted in what many consider a *de facto* form of payola.

[4] "Survey of Reissues of U.S. Recordings", Tim Brooks, Council on Library and Information Resources and Library of Congress, August 2005. http://www.clir.org/pubs/reports/pub133/contents.html

Under more recent payola-like practices, radio station group owners established exclusive arrangements with "independent promoters," who acted as middle agents between the stations and the record labels. On the station side, the indie promoter guaranteed a fixed annual or monthly sum of money to the radio station group or individual station. In exchange for this payment, the radio station group agreed to give the independent promoter first notice of new songs added to its playlists each week. On the label side, the labels hired the indie promoters to promote their records to certain stations and groups, since they were aware that stations in the group also tended to play mostly records that had been suggested by the independent promoter. As a result of the standardization of this practice, record companies and artists generally had to hire and pay these independent promoters if they wanted to be considered for airplay on those stations.

The primary problem with payola for musicians is its distorting effect on what gets played on the radio. Instead of being judged on the merits of the performance and recording, various forms of paid consideration and business relationships determine what gets played on the air. In addition, payola serves as a barrier to access to the public airwaves; the only musicians that can benefit from radio airplay are those that can afford to participate in this label/indie promoter/radio station relationship.

NY Attorney General Eliot Spitzer has been the most aggressive at combating payola. Using the subpoena power of his office to acquire evidence, his 2004–2006 investigation uncovered *quid pro quo* relationships that were suspected to be blatant violations of payola laws, including bribery in the form of lavish gifts and trips given by labels to radio stations and their employees in return for airplay of the labels' songs. As a result of his investigation, two of the four major labels have settled out of court, paying a total of $15 million. Spitzer's investigation will continue in 2006.

Senator Feingold has also attempted to address the problem. In 2003, he introduced S. 221, the Competition in Radio and Concert Industries Act. The bill addressed the anti-competitive practices of some radio corporations that allegedly leveraged their market power to shake down the music industry in exchange for playing their songs. While this bill did not make it out of committee, it delivered a message to the radio and concert industry that any business practices that leveraged one corporate arm against another at the expense of artists would not be tolerated. FMC believes that Feingold's bill forced the industry to move away from the independent promoter structure, and create more firewalls between concert and radio divisions.

FMC believes that payments made or consideration provided to radio stations to influence playlists – other than legitimate and reasonable promotional expenses – must be prohibited, unless such payments are announced over the air. This includes payments made through independent radio promoters and considerations like free concerts or other services provided to radio stations.

FMC urges Congress to support the passage of S. 2058, the Radio and Concert Disclosure and Competition Act, introduced by Senator Feingold in November 2005. The bill extends definition of payola to include pay for play practices and forces breakage of links between concert promoters, venues and airplay. We also urge the FCC to hold radio stations found accepting payola accountable and apply appropriate penalties or fines.

Media Ownership and Net Neutrality: One of the most significant aspects of the transformation to a digital music economy is rooted in the "common carrier" underpinnings of the Internet. Because the Internet is essentially open, the creator/artist has the right and the ability to make their work available to potential consumers, and consumers. These consumers, in turn, are able to access that work via a number of legitimate, licensed platforms and services.

This fundamental shift has revolutionized the music economy, as artists are no longer forced to enter into negotiations with record labels or participate in illegal payola-like practices in order to access the marketplace. Similarly, music fans now have a wide range of opportunities to access music, information and content. This dynamic is one of the core reasons that music released by independent labels has grown to an estimated 28 percent market share.

The music community has very legitimate reasons to be concerned both with the ownership rules that govern traditional media and the new framework being developed by Congress to govern broadband and other "post-media" technologies.

Technology ensures that the traditional bottlenecks separating artists from consumers can be overcome; now Congress must ensure that innovation will continue, a competitive marketplace for high speed services will develop and the basic ability of the artist to access the Internet as a way of reaching potential consumers will be written into law. FMC urges Congress to: hold the line on radio consolidation; expand and protect noncommercial media; ensure the transition to HD radio benefits musicians and citizens and; understand the value of network neutrality to copyright owners and music fans.

Orphan Works and Database Authentication

Finally, on orphan works. While there may be unmeasured enthusiasm in the music community for remedies for small copyright claims such as the ones suggested by Lemley and Reese, it may be premature to address this issue before we solve the Copyright Office's larger question regarding orphan works. This is particularly important to FMC as orphan works is an issue that many of our constituents have raised and discussed in the recent years. In March 2005, FMC, AFTRA and AFM filed joint comments in the Orphan Works proceeding at the US Copyright Office.[5] Our comments

[5] http://www.futureofmusic.org/news/orphanworks.cfm

recommended that the US consider adopting a modified version of the Canadian Unlocatable Copyright Statute to allow creators and the public to use copyrighted works that are unavailable because the copyright owner is either unidentifiable or unlocatable. In addition, we asked the Copyright Office to issue a notice of inquiry examining the status of out-of-print sound recordings, something that is particularly important for musicians whose prior albums may not be available for sale.

FMC also believes that much more must be done to increase authentication structures to give artists the ability to publicly and easily claim ownership of works in up-to-date, transparent, and publicly available databases and registries. Databases have recently helped identify independent and amateur artists who traditionally would have slipped through the cracks of recognition of the terrestrial music industry. For example, SoundExchange, which is the performance rights organization that administers the collection and distribution of royalties for the public performance of sound recordings on most digital services, compared its database of sound recording artists with unclaimed royalties with the database of a company called CD Baby that distributes the music of over 120,000 independent artists. When they compared their lists, they identified 15,000 CD Baby artists with royalties to claim. CD Baby then urged its members to sign up with SoundExchange to collect their royalties. This is just an example of the effectiveness of comparing two privately administered databases. Databases with similar qualities could greatly benefit with the identification of various works, thus diminishing the occurrence of orphaned works, and allowing for the continued circulation and use of existing copyrighted material.

Conclusion

Experience has shown us that when ownership of copyrighted works is documented in transparent, publicly-accessible databases, it makes it easier for users to obtain licenses. The easier the licensing process, the more money that flows to artists. FMC continues to support systems that both respect copyright owners right to control their works while also

incentivizing the maximum circulation of copyrighted works.

Legal remedy is a valued tool that copyright owners have in defending their intellectual property. FMC is unwilling to publicly advocate for changes that would impact this right until we were sure that the impact would be positive for musicians. That said, it is unclear to FMC whether litigious, penalty-focused solutions would be more effective at compensating artists than solutions focusing on authentication and inexpensive licensing structures.

Thank you again for inviting us to be part of today's hearing and I look forward to your questions.

Respectfully,

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